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*NOT ADMITTED TO THE NEW YORK BAR

August 20, 2017

By ECF

The Honorable Cathy Seibel
United States District Judge
The Honorable Charles L. Brieant Jr.
Federal Building and United States Courthouse
300 Quarropas Street
White Plains, NY 10601-4150

International Business Machines Corporation v. Jeff S. Smith, No. 17 Civ. 5808

Dear Judge Seibel:

We are submitting this letter on behalf of Plaintiff International Business Machines Corporation ("IBM") in response to the letter Defendant Jeff Smith submitted Friday evening (ECF No. 58) asking the Court to unseal various documents filed under seal and designated as confidential or highly confidential. The issues raised in Smith's letter are not properly before the Court at this time because Smith has failed to abide by the procedures agreed upon by the parties and so-ordered by the Court in the Protective Order.

The Protective Order requires a party challenging confidentiality designations to send written notice to the designating party and to raise the challenge "in the first instance on an informal basis" and to attempt resolution of the challenge in good faith before seeking court intervention. The Protective Order authorizes the objecting party to apply to the Court for a ruling on the challenge only if "the challenge cannot be

Honorable Cathy Seibel

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resolved on an informal basis,” and it requires any such application to be preceded by “reasonable prior notice” by the objecting party to the designating party.

Smith abided by none of these requirements before he submitted his letter on Friday. Smith did not: (i) send us written notice challenging our confidentiality designations; (ii) attempt to informally resolve the challenge with us in good faith; or (iii) send us prior written notice before making an application to the Court.

This is not the first time Smith has attempted to raise confidentiality and sealing issues without following the parties’ agreed-upon procedures set out in the Protective Order. He attempted to raise such issues in advance of and during an August 7 conference before Judge Davison, but Judge Davison agreed with IBM that this was not an urgent issue and that it could be addressed in the first instance in a meet-and-confer between the parties. Smith did not thereafter seek to meet and confer with us on this issue. Then, at an August 14 conference, Judge Davison granted the parties leave to move to unseal at the appropriate time, but did not suggest that the procedures in the Protective Order did not need to be followed.

Given these circumstances, Smith’s request is premature and should be addressed, if at all, only after Smith follows the procedures in the Protective Order. Should Smith do so, we will of course work in good faith with his counsel to identify any portions of the record that may be publicly docketed. If, after those procedures are exhausted, any disputes between the parties remain, Smith can make an appropriate application to the Court at the conclusion of the hearing. If the Court would like to hear from the parties on these issues before then, we will be prepared to address them.

Respectfully submitted,



Robert A. Atkins

cc (by ECF): Counsel of Record